Office Supreme Court, U. S.
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No. 131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1923.

W. FISH WILSON, County Collector of Taxes of the County of Marion; RICHARD FARRELL, County Collecotr of Taxes of the County of Clinton; WILLIAM H. PORTER, County Collector of Taxes of the County of Washington; JAMES H. THIMMING, County Collector of Taxes of the County of Perry; and JAMES H. McGUIRE, County Collector of Taxes of the County of Randolph, in the State of Illinois,

Appellants,

v.

ILLINOIS SOUTHERN RAILWAY COMPANY, WILLIAM W. WHEELOCK, as Receiver of the Property of the ILLINOIS SOUTHERN RAILWAY COMPANY; WILLIAM T. ABBOTT, Trustee of the Bondholders of the ILLINOIS SOUTHERN RAILWAY COMPANY and THE MISSOURI AND ILLINOIS RAILROAD COMPANY,

Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.

MOTION OF APPELLEES TO DISMISS APPEAL OR TRANSFER CAUSE TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF OF ARGUMENT IN SUPPORT.

GEO. E. GILLESPIE,
Attorney for Appellees.

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MOTION OF APPELLEES TO DISMISS APPEAL OR TRANSFER CAUSE TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

And now comes the appellees and move the court to to dismiss the appeal herein or transfer the cause to the Circuit Court of Appeals for the Seventh Circuit of the

United States for want of jurisdiction or transfer and as causes and grounds for said motion submit the following:

(1) The motion to dismiss the bill finally ruled upon by the District Court for the Eastern District of Illinois raises but a single question, the sufficiency of the allegations of the bill to give a court of equity jurisdiction of the cause. The grounds stated therein are as follows:

> "It appears from the face of the bill of complaint filed herein the only alleged invalidity of the taxes sought to be enjoined by the decree of this court sonsists wholly (of) descriminatory over-valuation of the property of the complainant.
>
> "It further appears from the allegations of said bill of complaint conclusively that the complainants have an adequate remedy at law and no grounds are stated in the bill of complaint that would justify a court of equity in taking jurisdiction of the matters therein charged and stated."
>
> (P. R. 78, R. 105.)

(2) The order of the court overruling the motion to dismiss shows upon its face that the only question presented to and considered by the court was whether the bill on its face states a case within the equitable jurisdiction of the United States courts. The order of the court overruling said motion is in the words following:

> "It is further ordered that the motion to dismiss the bill of complaint herein for want of equity

be and the same is hereby overruled and denied." (P. R. 80, R. 108.)

(3) The motion to set aside the order of reference and permit the appellant to present the motion which was finally ruled upon by the court and which ruling is the basis of this appeal only requested the consideration of the single question whether "grounds are stated in said bill of complaint that would justify a court of equity in taking jurisdiction of the matters therein charged and stated," and concludes with this prayer:

> "That the order of reference may be set aside, answer of the defendant withdrawn and leave to file this motion granted, and that upon a final hearing of this motion the same may be sustained and said bill of complaint dismissed for want of equity." (P. R. 78, R. 106.)

(4) In the brief filed by appellants they limit this court to the consideration of the single question whether there is equity on the face of the bill and admit that the jurisdiction of the United States District Court for the Eastern District of Illinois was sufficiently stated in the bill. On page 7 of their brief appears the following:

> "The only question arising on the record in this court is whether on the face of the bill appellees have an adequate remedy at law, and whether the facts alleged are sufficient to constitute the taking of property without due process of law or a denial of the equal protection of the law in violation of the due

process and equal protection clauses of the Fourteenth Amendment." (Appellant's brief, p. 7.)

But in discussing the case in their brief the question of federal jurisdiction is expressly waived and the argument limited to whether there is equity on the face of the bill in this statement:

> "First, there must be federal jurisdiction or a federal question. This requirement is met in all the cases (referring to the cases just previously discussed) **as well as in the case at bar** with the averments that the taxpayer is about to be deprived of his property without due process of law. It is not sufficient, however, that this one condition is found to exist, but it must also concur with the further condition and essential requirement that some ground must be stated for equitable relief." (Appellant's brief, 56.)

And, upon consideration hereof appellees pray that the appeal herein be dismissed for want of jurisdiction because no federal question is involved, or in the alternative that this cause may be transferred to the United States Circuit Court for the Seventh Circuit of the United States for determination of the questions presented by the record herein, and in support of this motion appellees submit the annexed brief and argument.

Geo. P. Gillespie

Attorney for Appellees.

STATEMENT.

After the preliminary injunction was granted herein a motion was filed to dissolve the injunction and dismiss the bill, which was considered by the Court on January 24, 1922, and on the consideration thereof it was practically conceded that the bill was in all respects sufficient. The motion did not question the jurisdiction of the Court as a Federal Court, nor suggest that no Federal question was involved. The motion was disposed of by the Court in these words:

> "Now this cause coming on for hearing on the motion to dissolve the temporary injunction heretofore granted and to dismiss the complainants' bill of complaint, the Court having heard solicitors for the respective parties, and being fully advised in the premises, overruled said motion, to which ruling of the Court the defendants, by their respective solicitors, then and there excepted, and the defendants were ruled to answer on or before the 20th day of February, 1922." (P. R. 62, R. 71.)

Afterwards, on the 20th day of February, 1922, the appellees filed their answer to the allegations of the bill in detail. (P. R. 62, R. 73-99.)

On the 12th of April, 1922, counsel for the respective parties entered into a stipulation agreeing to a reference of the cause to Mr. Henry Keefe, a court reporter, as

Special Master, to take and report the evidence to the Court without findings. (P. R. 75, R. 100.) On the same day Mr. Keefe was appointed and the cause was referred to him to take and report such testimony pursuant to the stipulation of counsel. On the first day of May, 1922, appellants filed their motion to set aside the reference, for leave to withdraw their answer and to review their motion to dismiss for want of equity and file their additional motion to dismiss said suit on the face of the bill upon the following grounds, namely, for want of equity on the face of the bill. (P. R. 78, R. 105.) On the 7th day of July, 1922, the Court granted this motion to the extent of setting aside the order of reference allowing the withdrawal of the answer and on the re-presentation of the motion to dismiss for want of equity, that was overruled and denied. (P. R. 79, R. 108-110.) Upon the overruling of the motion to dismiss for want of equity, appellants elected to stand by their bill and their motion to dismiss for want of equity, waived the right to answer the bill and refused to further plead or answer to the bill as required by the order of the Court. (P. R. 80, R. 109.) Subsequently on July 7, 1922, a decree *pro confesso* was rendered. (P. R. 81, R. 113-117.)

It, therefore, appears conclusively from this record that the only question presented for consideration to this Honorable Court is whether the bill states upon its face a cause within the equitable jurisdiction of the United

States Courts. The question whether the bill states upon its face a case within the jurisdiction of the United States District Court for the Eastern District of Illinois as a federal court was not raised, presented or considered by the Court. The motion to set aside the order of reference for leave to withdraw the answer and file a motion to dismiss for want of equity was elaborately argued, both orally and by printed briefs. The Court gave notice to counsel of his conclusions by written memorandum in the following language:

> "Two questions entered into the discussion and the consideration of this motion. First; does the bill of complaint state or show upon its face a case which gives the Federal Court jurisdiction?
>
> "Second: Does there appear upon the face of the bill of complaint a state of facts which would authorize or require the aid of equity?
>
> "The first of these questions is answered in the affirmative by counsel, both for the complainant and the defendants, as there is no room for doubt but that the Federal Court has jurisdiction of the subject matter here involved.
>
> "Upon the second question, after having carefully read authorities, briefs and arguments of counsel, and carefully considering the bill, the Court is of the opinion that there is ample showing made upon the face of the bill to justify and demand the intervention of equity.

"Therefore, it is the judgment of the Court that this motion should be denied.

"George W. English, Judge."

While it is our understanding that a copy of the memorandum was filed in the record, it appears not to have been included in the record prepared for this Court, but there will be no controversy between counsel in relation to the words of the Judge expressing his views concerning the questions submitted in argument.

In discussing the case in their brief, the question of federal jurisdiction is expressly waived and the argument limited to whether there is equity on the face of the bill in this statement:

> "First, there must be federal jurisdiction or a federal question. This requirement is met in all the cases (referring to the cases just previously discussed) **as well as in the case at bar** with the averments that the taxpayer is about to be deprived of his property without due process of law. It is not sufficient, however, that this one condition be found to exist, but it must also concur with the further condition and essential requirement that some ground must be stated for equitable relief." (Appellant's brief, 56.)

It has been frequently decided by this Court that where a federal question is not in fact controverted in the United States District Court, the appeal or writ of

error should be taken to or issue from the Circuit Court of Appeals, and not the Supreme Court of the United States.

It is also an established principle that whether such question was involved must be determined from the record, and not from the assignments of error. In other words, that an appellant or plaintiff in error cannot import a question into the record which does not appear therefrom to have been in fact considered and decided by the trial court.

BRIEF OF ARGUMENT.

Whether this appeal is properly brought to this Court depends upon a construction of Sec. 238 of the Judicial Code, which provides:

> "Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States. (36 Stat. L. 1157, as amended 38 Stat. L. 804.)
>
> 5 Fed. Stat. Ann., 2nd Ed., 794.

This statute has been construed by this Court many times and a leading case construing it is *Cornell* v. *Green*. That case covers every point involved here and establishes these propositions:

(1) A case cannot be brought to this Court unless a federal question is involved.

(2) A federal question will not be held to be involved where no construction or application of the federal constitution or a federal statute was either expressed by or asked of the District Court and no question of the jurisdiction of the Court is certified to this Court.

(3) The dismissal of a bill on demurrer for want of equity does not present a question which this Court will consider in the absence of a federal question upon the record.

(4) An assignment of errors cannot be availed of to import into a cause questions which the record does not show were raised in the court below and rulings asked thereon so as to give jurisdiction to the Supreme Court of the United States.

Cornell v. *Green*, 163 U. S., 75; 41 L. ed., 76.

Speaking of the general intention of the Judiciary Act with regard to a distribution of appellate jurisdiction of federal courts, this Court said:

> "The general intention of the act was to distribute the appellate jurisdiction and to permit an appeal to only one court. (*Robinson* v. *Caldwell*, 165 U. S., 359; 41 L. ed., 745.) In this case appellants did not attempt to take an appeal directly to this Court from the Circuit Court nor could they

have done so, since no question was so raised as to bring the case within either of the classes named in Section 5. (*Cornell* v. *Green*, 163 U. S., 75; 75 L. ed., 76.)"

Hugulay Mfg. Co. v. *Galeton Cotton Mills Co.*, 184 U. S., 295; 46 L. ed., 548.

The jurisdiction of the federal Supreme Court under the Judicial Code to review judgments of the District Court exists only when such question was actually raised in the trial court.

Itow v. *United States*, 233 U. S., 583, 586; 58 L. ed., 1102.

We have shown in the statement not only that no federal question was controverted under Section 5 of the Judiciary Act or Section 238 of the Judicial Code, and this Court has in no uncertain terms held that where such is the case no appeal lies from the United States District Court and no writ of error can issue out of this Court to review a judgment based upon such a record. The rule was stated and the cases in support thereof cited by Chief Justice Fuller, as follows:

"When our jurisdiction is invoked under Sec. 5, of the Judiciary Act of March 3, 1891 (2 Stat. at L. 8263, Chap. 517, on the ground that the case falls within the fourth, fifth or sixth of the classes of cases therein enumerated, it must appear that a title, right, privilege, or immunity was claimed under the Constitution, and a definite issue in respect to the possession of the right must be distinctly dedu-

cible from the record; or that the constitutionality of the particular law or the validity or construction of the particular treaty was necessarily and directly drawn in question; or that the Constitution or law of a state was distinctly claimed to be in contravention of the Constitution of the United States; and it is not sufficient that the point is raised in the assignment of errors. *Ansbro* v. *United States*, 159 U. S., 695, 40 L. Ed. 310, 16 Sup. Ct. Rep. 187; *Cornell* v. *Green*, 163 U. S. 75, 41 L. Ed. 76, Sup. Ct. Rep. 969; *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, 42 L. Ed. 531, 18 Sup. Ct. Rep. 109; *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 42 L. Ed. 409, 18 Sup. Ct. Rep. 34."

Cincinnati, Hamilton & Dayton R. Co. v. *Thiebaud*, 177 U. S. 619; 44 L. Ed., 913.

In the case of *Guaranty Trust Company of New York* v. *Metropolitan Street Railway Company, et al.*, No. 607, which was a similar case dismissed for want of jurisdiction this Court cited the cases to date.

Guaranty Trust Company of New York v. *Metropolitan Street Railway Company*, 215 U. S., 585, 588; 54 L. Ed., 339.

The consessions in the record that a federal question was involved in the trial court, and the admission of the brief of appellant, "First, there must be federal jurisdiction or a federal question. This requirement is met in all the cases (referring to the cases just previously discussed) as well as the case at bar with the averments that the taxpayer is about to be deprived of his property without due process of law," remove that question from

this record as one that can be considered on appeal and seem to establish our contention beyond controversy.

The record makes it clear that the position of appellants in the court below was of acquiescence and agreement that the United States District Court had jurisdiction of the subject matter by virtue of the allegations of the bill. They cannot now change their position and insist that the question of jurisdiction was in issue.

State of Ohio, ex rel. v. *Swift & Co.*, Nos. 2 and 3, U. S. Sup. Ct. Adv. Sheets, (Co-op.) p. 31.

> "One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the Appellate Court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defined in the court below. Thus, when both parties act upon a particular theory of the cause of action they will not be permitted to depart therefrom when the case is brought up for appellate review. * * *"

3 C. J. p. 718, Sec. 618.

The jurisdictional allegations of the bill if controverted would have required the District Court to construe and apply the due process clause and the equal protection clause of the Fourtenth Amendment of the Constition of the United States to the subject matter of

the suit, but the allegations of the bill were, nevertheless, for the purpose of conferring jurisdiction on the United States District Court and necessary to that purpose. Without such allegations that Court would not have had jurisdiction. Those averments with respect to Section 238 of the Judicial Code prescribing the appellate jurisdiction of this Court may be regarded, therefore, in two aspects—first, as jurisdictional allegations and, secondly, as allegations asking construction and application by the District Court of the provisions of the Federal Constitution. Up to this point we have considered them only in the latter aspect and have shown that there was in fact no construction or application of the provision of the Constitution by the District Court. That on that subject as well as the subject of jurisdiction there was complete acquiescence and consent to the procedure through which that question was waived and it was practically agreed that the allegations of the bill were sufficient.

We now draw attention to the fact that as a question of jurisdiction the record does not show that such a question was raised and there is no certificate of the judge of the District Court in the record certifying to this Court a question of jurisdiction to be considered as required by Section 238 of the Judicial Code. The only recital in the record over the signature of the judge is a brief order

allowing an appeal fixing the appeal bond at one thousand ($1,000.00) dollars and approving the sureties for the appeal bond. (P. R. 90, R. 125.)

The word "jurisdiction" as used in Section 238 of the Judicial Code was defined by the Chief Justice of this Court in the case of *Mudsill Mining Company* v. *Swan*, 13 CCA., 77. It was said that jurisdiction as used in that paragraph is applicable to initial questions of the jurisdiction of the United States District Court and Circuit Courts whether in law or equity over the subject matter and parties and not to questions whether a court of equity or law is the proper forum for working out the rights properly within the particular federal jurisdiction for ajudication. This definition has been adhered to and applies to all cases in which that question is involved under this section of the Judicial Code. If a federal question is involved either directly or indirectly as a question which would confer jurisdiction and being in issue is passed upon, then the case might also go to this Court on appeal, or by writ of error without a certificate and when the case came under consideration the Court might or might not consider and decide the federal question if the case might be decided upon other issues involved. But, where the federal question is not presented under a certificate as one of jurisdiction and does not appear upon the record as a question in issue and presented to and decided by th eDistrict Court, there is

nothing for this Court to consider and the cause would in such case be wrongfully in this Court without power of the Court to consider any question presented by the record.

United States v. *Larkin*, 208 U. S. 333; 52 L. Ed., 517.
Louisville Trust Co. v. *Knott*, 191 U. S., 225; 48 L. ed., 159;
Blythe v. *Hinckley*, 143 U. S., 501;
Ansbrow v. *United States*, 159 U. S., 695; 40 L. ed., 310.

The case last above cited holds that a definite issue as to the possession of a right under the United States Constitution must be deducible from the record before a judgment of the court below can be reviewed by this Court on the ground of an error in the disposal of such claim by its decision, and that an assignment of errors cannot be availed of to import questions into the cause which the record does not show were raised in the court below and rulings thereon so as to give jurisdiction to this Court under the Act of March 3, 1891. And, that where the jurisdiction of the District Court was an issue a certificate of such question of jurisdiction to this Court for decision is necessary or the case is not properly here.

See also:

Morrisdale Coal Co. v. *Pennsylvania R. R. Co.*, 183 Fed., 929;
Apapas v. *United States*, 233 U. S., 582;
Smith v. *McKay*, 161 U. S., 355;
Southern Pacific Co. v. *Stewart*, 145 U. S., 359.

If the jurisdiction of the federal court is not put in issue it matters not that that question is presented by the pleadings, neither is it material that it is averred in the bill of complaint, but in fact not decided; or, if waived in the briefs of counsel that will take the question out of the record if a mere federal question, not preserved as one of jurisdiction.

United States v. *Swan*, (CCA) 65 Fed., 647;
Cornell v. *Green*, 163 U. S., 75; 41 L. ed., 76.

Under the practice which prevailed prior to the enactment of the amendment to the Judicial Code by adding 238a thereto, in relation to appeals and writs of error, of September 14, 1922, 42 Stat. L. 837, the appeal in this case would have to be dismissed. That statute, however, provides for the transfer of cases wrongfully brought to this Court to the court to which the appeal should have gone or from which writ of error should properly have issued. This statute was construed by this Court in the case of *Heitler* v. *United States*, 7 Sup. Adv. Ops. Feb. 1, 1923 (Co-op.), p. 215; and, as we construe the opinion of the Court, the order of this Court should now transfer the record of this case to the United States Circuit Court of Appeals for the Seventh Circuit, where the questions preserved in the record may be considered or the cause be otherwise disposed of according to the practice of that Court.

We might well have based this motion also upon the ground that the appeal is a frivolous one, but as we construe the opinion of this Court in the *Heitler case*, that question should properly be reserved and presented to the Circuit Court of Appeals after a transfer of the record to that Court.

Respectfully submitted,

GEORGE B. GILLESPIE,

Attorney for Appellees.